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No. 06-528

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In The Supreme Court of the United States

TOM LUNDEEN, *et al.*,

Petitioners,

vs.

CANADIAN PACIFIC RAILWAY COMPANY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICI CURIAE* STATES OF NORTH DAKOTA, CALIFORNIA, INDIANA, IOWA, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, OKLAHOMA, OREGON, SOUTH DAKOTA, UTAH, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI*

The *amici* States have an interest in preserving state court jurisdiction over state-law tort claims and other state-law causes of action, an exercise of state authority compromised by the Eighth Circuit's novel application of the "complete preemption" removal doctrine. Displacing state-court jurisdiction over state-law tort claims undercuts the traditional division of authority between state and federal courts and, more fundamentally, long-standing federalism principles. It is of particular concern here, where the federal statute relied on for removal – the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20101 *et seq.* – does not create a federal cause of action or remedy, and ultimately results in dismissal of the action.

State and federal courts are partners in fulfilling the country's judicial responsibilities. The well-pleaded complaint rule is a core component of the partnership and recognizes state-court competence. Broadening the complete-preemption doctrine as an exception to the well-pleaded complaint rule has "obvious federalism implications," Arthur R. Miller, *Artful Pleading: A Doctrine in Search of a Definition*, 76 Tex. L. Rev. 1781, 1797 (1998), and undermines the division of authority that the rule has preserved since enunciated in 1888. *See Louisville & N. R. R. Co. v. Mottley*, 211 U.S. 149, 154 (1908) (citing *Metcalf v. Watertown*, 128 U.S. 586 (1888), as the original well-pleaded complaint decision). State judicial systems are not only capable of handling tort claims, but have developed sophisticated processes and long-standing precedents for adjudicating negligence actions. And they do so efficiently. Further, they are capable and have developed a credible record applying federal law, including substantive preemption law. The *amici* have an abiding interest in ensuring

that this partnership is not unjustifiably revised to lessen the role of state courts.

The well-pleaded complaint rule has kept state-law causes of action in state court when substantive preemption defenses have been raised. Complete preemption removal jurisdiction has attached only in those rare circumstances when Congress wholly displaces the state-law cause of action with a federal cause of action, and also sets forth procedures and remedies governing that cause of action – *i.e.*, when the two-part test in *Beneficial National Bank v. Anderson*, 539 U.S. 1, 8 (2003), is satisfied. The Eighth's Circuit's decision eviscerates the well-pleaded complaint rule, ignores *Beneficial*'s two-part test, and thereby disrupts the federal-state balance in this area of the law.

REASONS FOR GRANTING THE PETITION

I. By disregarding the boundaries placed on the complete preemption doctrine in *Beneficial National Bank* – under which the doctrine applies only when two specific showings are made – the Eighth Circuit improperly broadened the doctrine's scope.

The Eighth Circuit removed 49 separate tort cases from state court by wrongly conflating substantive preemption with the "complete preemption" doctrine. Ordinary substantive preemption arises from the force of the Supremacy Clause, which declares that the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; . . . any . . . Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2.

This Court has crafted a complex body of law governing when federal law displaces state law, and, along with the lower state and federal courts, addresses claims of express, implied, and field preemption with some frequency. *See, e.g., Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431 (2005); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). The "complete preemption" doctrine is a different creature altogether.

When a state-law claim is completely preempted, it is converted into a federal-law claim by operation of law, and therefore removable under the federal courts' "arising under" jurisdiction. *See Beneficial Nat'l Bank*, 539 U.S. at 8. As the Fourth Circuit has put it, "[c]omplete preemption is a 'jurisdictional doctrine,' while ordinary preemption simply declares the primacy of federal law, regardless of the forum or the claim." *Lontz v. Tharp*, 413 F.3d 435, 440 (4th Cir. 2005). Whereas myriad federal laws have been found to preempt state laws, this Court has so far found only three federal statutory provisions that *completely* preempt state law: Sections 85 and 86 of the National Bank Act, *see Beneficial Nat'l Bank*, 539 U.S. at 9-11; § 301 of the Labor Management Relations Act (LMRA), *see Avco Corp. v. Machinists*, 390 U.S. 557 (1968); and § 502 of ERISA, *see Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

By holding that the FRSA completely preempts state law – thereby converting petitioners' state-law claims into federal claims – based solely on its (mistaken) conclusion that the FRSA preempts petitioners' state actions in the ordinary sense, the Eighth Circuit has fundamentally misapplied the complete preemption doctrine. Unless this Court corrects the Eighth Circuit's improper expansion of the complete preemption doctrine, plaintiffs around the nation – including state Attorneys General – can expect to

expend significant time and resources litigating this removal issue.

A. The Eighth Circuit disregarded the narrow scope of the complete preemption doctrine, as set forth in *Beneficial National Bank*.

1. Congress has never authorized federal courts to hear claims under their "arising under" jurisdiction to the full extent permitted by the Constitution. In *Osborn v. Bank of the United States*, 22 U.S. 738, 822-23 (1824), the Court held that "arising under" jurisdiction within the meaning of Article III, § 2, exists when the resolution of a federal question might determine the outcome of the case. Yet because Article III's grant of judicial power to federal courts other than the Supreme Court is not self-executing, "it was not until the Judiciary Act of 1875 that Congress gave the federal courts general federal-question jurisdiction." *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 807 (1986) (citing 28 U.S.C. § 1331, which contains the same "arising under" language as Article III, § 2). In a series of cases culminating in *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908), the Court held that a federal court lacks subject-matter jurisdiction under § 1331 if the plaintiff's complaint asserts on its face only state-law causes of action, regardless of whether the defendant asserts defenses (such as preemption) that are based on a potentially displacing federal law. Whether a civil action arises under a federal statute turns, in other words, on what is pleaded within the four corners of a plaintiff's complaint, and not on issues raised in the answer.

The removal statute – 28 U.S.C. § 1441 – limits removal jurisdiction to "any civil action" over which the

federal district courts "*have original jurisdiction*" except when "otherwise expressly provided" by Congress. The vast majority of cases removed under federal-question jurisdiction are cases "in which federal law creates the cause of action." *Merrell Dow*, 478 U.S. at 808. Consequently, a state-law claim "may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987). In *Merrell Dow*, the Court confirmed that even when federal issues are elements of state-law causes of action, removal under federal-question jurisdiction is improper. 478 U.S. at 808.

A broader exercise of federal jurisdiction over state-law claims than allowed in *Merrell Dow* "would . . . have heralded a potentially enormous shift of traditionally state cases into federal courts." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 318-19 (2005) (citing *Restatement (Third) of Torts* § 14).[1] Accordingly, the ordinary rule is that state-law tort claims, such as the negligence claims brought by petitioners, are not removable merely because a substantive preemption defense is raised.

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[1] *Grable* established a "special and small category" of cases, *Empire Healthchoice Assur., Inc. v. McVeigh*, 126 S.Ct. 2121, 2137 (2006), that fall under § 1441 removal jurisdiction because a substantial question of federal law is a necessary element of a state-law claim and removal will not upset the balance of federal and state judicial responsibilities. As petitioners note (Pet. 12 n.2), that exception was not relied on by the Eighth Circuit and is not at issue in this case.

2. In *Beneficial,* this Court confirmed the existence of the complete preemption doctrine as a very narrow exception to that general rule. *Beneficial* held that an action asserting only state-law claims can be removed to federal court under the complete preemption doctrine when a two-part test is met: the federal statutes at issue provide "the exclusive cause of action for the claim asserted *and also* set forth procedures and remedies governing that cause of action." 539 U.S. at 8 (emphasis added). When those two conditions are met, the "cause of action, even if pleaded in terms of state law, is in reality based on federal law." *Id.*

Rather than apply *Beneficial*, the court below relied on pre-*Beneficial* Eighth Circuit decisions that had adopted a markedly different approach. *See* Pet. App. at 20a-29a [447 F.3d at 611-14] (citing *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996); *Peters v. Union Pac. R.R.*, 80 F.3d 257 (8th Cir. 1996)). In doing so, the Eighth Circuit confused and conflated the complete-preemption doctrine with substantive preemption analysis. Thus, for example, the court observed that "Congressional intent is the 'ultimate touchstone' guiding preemption analysis" and that "[i]f the statute contains an express preemption clause, then the statutory construction should center on its plain meaning as the best evidence of Congress's preemptive intent." Pet. App. at 21a [447 F.3d at 611-12] (citations omitted).

Nowhere did the Eighth Circuit address the *Beneficial* factors that must be established to exercise complete-preemption removal jurisdiction. The court did not address whether the FRSA sections at issue provide "the exclusive cause of action for the claim asserted" (*Beneficial*'s first factor) or whether the FRSA sets forth "procedures and

remedies governing that cause of action" (*Beneficial*'s second factor). While the court noted that regulations adopted under the FRSA subject railroads to civil penalties for violations, Pet. App. at 27a [at 614], the court did not explain how such an administrative non-remedial provision satisfies either *Beneficial* factor. Nor could it, had it tried. In this Court's past complete preemption cases, private state-law causes of action were transformed by operation of law into private federal causes of action under the National Bank Act, the LMRA, or ERISA. No such transfer can occur under the FRSA, which does not create a private cause of action into which petitioners' state-law claims could be recast.

The decision of the Eighth Circuit broadly expands the limited circumstances defined by *Beneficial* for when a state-law claim may be removed to federal court under the complete-preemption doctrine. By conflating the complete-preemption doctrine with substantive preemption analysis, the Eighth Circuit threatens to cause what the limiting language from *Grable* was intended to prevent: a potentially enormous shift of traditionally state tort actions into federal courts based on federal preemption defenses, such as the 49 separate cases removed by the Eighth Circuit below.

B. The complete-preemption doctrine is a particularly poor fit for the FRSA.

The Eighth Circuit's failure to comprehend the complete-preemption doctrine was compounded by its failure to appreciate the substantive preemption analysis under the FRSA. In *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993), this Court addressed preemption claims under

the FRSA for the first time. The Court observed that the FRSA preemption provision "displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express saving clauses." *Id.* at 665. To resolve the particular preemption defenses asserted by the railroad, the Court therefore looked in detail at the specific facts supporting the tort claim, at the particular federal regulations purportedly relevant to the claim, at the state's specific use of federal funds, at "whether the preconditions for application of either [federal] regulation have been met," at the compatibility of concurrent state and federal rules, and at whether the state rules concerned local safety hazards. *Id.* at 665-75. The doctrine of complete preemption is wholly unsuited to such a regime. Removal occurs at the outset of a case. *See* 28 U.S.C. § 1446(b) (requiring "notice of removal of a civil action" to "be filed within thirty days after" service of process). It would make no sense for a federal district court to oversee exhaustive discovery and trial proceedings that might result in a determination that – because there is no preemption on the facts of the case – it has no jurisdiction, and the case must be remanded. This case is a prime illustration of the mismatch between the complete-preemption doctrine and the FRSA.

The National Transportation Safety Board concluded that the probable cause of the Minot derailment was "an ineffective Canadian Pacific Railway inspection and maintenance program that did not identify and replace cracked joint bars before they completely fractured and led to the breaking of the rail at the joint."[2] The Amended

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[2] *Track Safety Standards; Inspections of Joints in Continuous Welded Rail (CWR)*, 71 Fed. Reg. 59677, 59678-79 (Oct. 11, 2006).

Complaint (at ¶ XII) alleges that the track where the derailment occurred was made of 100-pound, continuous-welded rail (CWR); that the use of 100-pound CWR on a mainline track is rare; that the industry normally uses at least 115-pound rail for mainline CWR track; and that when the January 2002 derailment occurred, Canadian Pacific was maintaining approximately 14,000 miles of track, only approximately 65 miles of which consisted of 100-pound mainline CWR – most of it in use in the track near Minot, North Dakota, where this derailment occurred.

In addition, the complaint alleges that the derailment occurred at a "temporary joint" spliced into the CWR. *Id.*, ¶ XVIII. The railroad's own policy required temporary joints to be welded "as soon as possible after the rail is laid" and in no event later than 30 days. *Id.* Yet the "temporary" joint that failed in the 2002 derailment had been left in the track for about 20 months prior to the derailment, *id.*, and a track inspection conducted six months prior to the derailment revealed that the joint that failed was being subjected to high tensile forces. *Id.*, ¶ XVIII. Further, the complaint alleges that the railroad did not meet either its own internal requirements, or industry standards, for anchoring the track in a manner that protects joints from the strong tensile forces that occur when a track is used in cold temperatures like those that existed when the train derailed on January 18, 2002. *Id.*, ¶¶ XXV and XXVI. Finally, the railroad failed to inspect the track properly and left a cracked joint bar in the track for nearly a year. *Id.*, ¶ XXXI.

The FRSA regulations do not cover the salient facts that give rise to Petitioners' complaint. For example, they do not establish any weight requirements for track, as this

is an industry standard. They also do not state the standard for anchoring CWR at joints; again, this is an industry standard. They also do not address temporary joints in CWR and how much wear is allowed or how long they may remain in the track; plaintiffs' claims are again based upon industry and internal standards. Finally, the regulations (in their 1998 form) do not set inspection standards for CWR, instead asking railroads to come up with their own individual standards and submit them for review. Here, the railroad did not submit inspection policies to the Federal Railroad Administration (FRA), as required under 49 C.F.R. § 213.119, and none of the submissions were reviewed by the FRA prior to the derailment anyway. Thus, none of the claims are substantively preempted. At the very least, the determination of substantive preemption requires a detailed and fact-specific analysis. There is no basis to believe that Congress intended to create a regime under which a federal court must undertake such an analysis merely to determine its own jurisdiction – and under which a plaintiff suing a railroad must prevail twice to obtain relief, once in the federal courts (following removal), and once in the state courts (following remand).

There is still one more reason why the complete preemption doctrine is incompatible with the FRSA. This Court has repeatedly held the law disfavors leaving victims of negligence without a remedy for damages. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) (it is "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct"); *Medtronic Inc.*, 518 U.S. at 487 (rejecting a broad interpretation of a preemption statute because that would mean "Congress effectively

precluded state courts from affording consumers any protection from injuries resulting from a defective medical device," calling such a result "perverse" because it would grant "complete immunity from design defect liability"). By holding that the FRSA completely preempts state law – even though it does not create an exclusive federal cause of action of which plaintiffs can avail themselves – the Eighth Circuit decision runs afoul of those admonitions.

II. The Eighth Circuit's vast and erroneous expansion of the complete preemption doctrine has numerous negative consequences.

Under the Eighth Circuit approach to complete preemption – which essentially equates ordinary, substantive preemption with complete preemption – the doctrine of complete preemption will apply to countless lawsuits filed each year. The transformation of a state-law claim to a federal claim will become not the rare exception, but the rule when (in the federal court's view) substantive federal preemption is clear. Not only does the Eighth Circuit rule disregard the limits imposed on the doctrine in *Beneficial National Bank* and the prior decisions upon which it relied, but it will create numerous adverse consequences to the states, litigants, and the courts.

A. The Eighth Circuit's rule undermines practical and federalism values served by the well-pleaded complaint rule and the presumption against removal.

In *Gully v. First Nat'l Bank*, 299 U.S. 109, 118 (1936), Justice Cardozo emphasized the practical advantages of the well-pleaded complaint rule. "If we follow the ascent

far enough," he wrote, "countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself." The well-pleaded complaint rule is necessary, therefore, "[t]o set bounds to the pursuit. . . . We shall be lost in a maze if we put that compass by." *Id.* More concretely, plaintiffs may incorrectly anticipate defendants' defenses, the federal issue in a case may not become apparent until well after the litigation has proceeded in state court, or federal defenses may be "concocted purely to confer jurisdiction." Richard Posner, *The Federal Courts: Crisis and Reform* 190 (1985). The well-pleaded complaint rule prevents those contingencies from interfering with the orderly disposition of actions filed in state court. The Eighth Circuit's decision in this case, by carving out a broad exception to the well-pleaded complaint rule, increases the likelihood that state tort actions will be subject to these practical complications.

The Eighth Circuit's decision also undermines the federalism interests served by the well-pleaded complaint rule and the concomitant presumption against removal. The well-pleaded complaint rule apportions cases between the state courts and federal courts in a manner that leaves state courts with considerable responsibility for construing federal law. That delegation of power to state courts reflects the recognition by Congress and this Court that state courts are fully capable of discharging their constitutional mandate to construe federal law. *See Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976). It also reflects the state courts' historical role as primary arbiters of federal law. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78, n.4 (1981).

And because removal deprives state courts of jurisdiction over original state-law causes of action, this Court has recognized that removal of such claims raises significant federalism concerns that mandate strict construction of the removal statute: "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941) (citations and internal quotations omitted). For this reason, since 1887, the burden of establishing federal jurisdiction is on the party seeking removal. *See Carson v. Dunham,* 121 U.S. 421, 425 (1887).[3] The Eighth Circuit's expansion of the complete preemption doctrine distorts the federal-state balance by authorizing the removal to federal court of a broad category of cases that have traditionally been heard in state court.

B. The Eighth Circuit rule threatens removal of state-law actions commonly brought by state Attorneys General.

State Attorneys General play a leading role in protecting the interests of consumers and in enforcing environmental laws. Most consumer protection and environmental enforcement actions brought by state Attorneys General are instituted in state courts. The decision below seriously threatens the states' ability to maintain that forum of

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[3] *See also Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921) (citing *Carson*); *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 365 (5th Cir. 1995) (same); *Mulcahey v. Columbia Organic Chem. Co., Inc.*, 29 F.3d 148, 151 (4th Cir. 1994) (same); *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993) (same).

their choosing, even when the Attorneys General carefully limit their causes of action to state-law claims.

Commercial enterprises that run afoul of state consumer protection and environmental laws are subject to a significant number of federal statutes and regulations, and defendants in actions brought by states frequently assert the defense of preemption. Under the Eighth Circuit's standard, those defendants would be entitled to have a federal court resolve the preemption issue – and, should it find preemption, uphold removal of the action. As a consequence, actions brought under an Attorney General's core regulatory authority would, at the very least, face protracted litigation about whether state enforcement actions should be removed when preemption defenses are raised, as has occurred in the Eighth Circuit in cases arising out of derailments such as the Minot derailment.[4]

North Dakota, for example, settled the environmental violations caused by the Canadian Pacific Railway Company arising out of the Minot derailment through judgment entered under a consent decree. *State of North Dakota v. Canadian Pacific Ry. Co.* (N.D. Dist. Court, Ward Cty., Civ. no. 03-C-1003, July 15, 2003). That case was an enforcement action to address violations of North Dakota's water (N.D.C.C. ch. 61-28), hazardous waste (N.D.C.C. ch. 23-20.3), and air pollution (N.D.C.C. ch. 23-25) statutes, and their implementing rules, that were caused by the January 2002 derailment that gave rise to the case below. As with all states who assume primacy over

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[4] *In re Derailment Cases*, 416 F.3d 787 (8th Cir. 2005); *Mehl v. Canadian Pacific Ry., Ltd.*, 417 F. Supp. 2d 1104 (D.N.D. 2006); *Kalan Enterprises, LLC v. BNSF Ry. Co.*, 415 F. Supp. 2d 977 (D. Minn. 2006).

a Congressionally-enacted environmental program administered under EPA's oversight, North Dakota assumed these programs as part of a system of "cooperative federalism," which allows each state the choice of regulating an activity according to federal standards or having state law preempted by federal regulation. *See, e.g., New York v. U.S.*, 505 U.S. 144, 167 (1992) (disposal of radioactive waste). North Dakota's implementing rules, like most states, are based on federal rules and, in many places, incorporate the federal rules by reference. *See, e.g.,* N.D. Admin. Code §§ 33-16-02.1-08, 33-15-01-15 (cited in ¶ 12 of the stipulated facts in the *North Dakota* consent decree). *See also* N.D. Admin. Code ch. 33-16-02.1, North Dakota's water quality standards, incorporating EPA-Clean Water Act rules throughout. Any preemption defense that could be raised to the violation of any of these rules would be, under the Eighth Circuit's subsequent decision, arguably removal to federal court. At best, this would add time and expense, and would delay resolution of the case; at worst, it would remove all such cases to federal district court when a preemptive defense is raised by the defendant.

South Dakota ex rel. S.D. R.R. Auth. v. Burlington Northern & Santa Fe Ry. Co., 280 F. Supp. 2d 919 (D.S.D. 2003) (decided a month after this Court's decision in *Beneficial*) provides an example of application of the Eighth Circuit's rule. There, South Dakota filed its state-law causes of action for specific performance of a contract, tortious interference, and injunctive relief against the railroad in state district court. *Id.* at 923. In its ruling on the motion for remand, the federal district court agreed that South Dakota's "complaint does not, on its face, allege any claimed federal question for federal question jurisdiction." *Id.* at 925. Yet the district court declined to remand

based on an analysis under "the doctrine of 'complete preemption.'" Like the Eighth Circuit's analysis in the case below, the district court conflated complete preemption with substantive preemption, *id.* at 926-35, and denied South Dakota's motion based primarily on the "obstacle" form of substantive preemption. *Id.* at 929. South Dakota and Burlington Northern ultimately settled this case.

C. The Eighth Circuit rule would increase the time, and drive up the expense, of litigation.

"Jurisdictional rules should be clear." *Grable*, 545 U.S. at 321 (Thomas, J., concurring). The case below is a prime example of what happens when jurisdictional rules are unclear. Five years after the derailment occurred, jurisdiction remains the issue. There is no reason, moreover, to believe this is a rare occurrence. Complete preemption "may be the most misunderstood of all federal jurisdictional rules." Garrick B. Pursley, *Rationalizing Complete Preemption After Beneficial National Bank v. Anderson: A New Rule, A New Justification*, 54 Drake L. Rev. 371, 372 (2006). As described in the Petition for Writ of Certiorari, the lower courts are confused about the doctrine of complete preemption and are in disarray as to how the FRSA preemption provisions apply. *See* Pet. 13-24. The Eighth Circuit's decision is emblematic of the problem, misreading the complete-preemption doctrine and the FRSA preemption provision to create a result – the transformation of traditional state-law causes of actions against railroads into federal claims – that Congress could not possibly have intended. As defendants around the nation cite the Eighth Circuit opinion, it will undoubtedly

exacerbate the disarray and increase the toll that jurisdictional battles impose on litigants and courts.

Moreover, plaintiffs commonly choose state courts over federal courts for a reason. Tort cases typically revolve around facts and causation, not legal technicalities. State courts have a long history with those kinds of cases; they form a more central part of state court dockets than their federal counterparts. Federal courts are often located far from plaintiffs' residences. In addition, overburdened federal judges more often "quickly" dispose of cases by stringently controlling discovery, aggressively encouraging settlement, and more frequently granting summary judgment. *See* Steven Plitt, and Joshua D. Rogers, *Charting a Course for Federal Removal Through the Abstention Doctrine: A Titanic Experience in the Sargasso Sea of Jurisdictional Manipulation*, 56 DePaul L. Rev. 107, 107 (2006).

The Eighth Circuit's rule therefore creates a Hobson's choice for those tort victims who wish to try their state-law tort actions in state court. Under the Eighth Circuit rule, any uncertainty as to substantive preemption – a notoriously complicated issue – results in uncertainty as to whether claims are completely preempted. Because removal is authorized if even one of a plaintiff's claims is completely preempted, the plaintiff is left in the unenviable position of having to decide whether to omit *any* claim that is even arguably preempted (as a substantive matter) or running the risk of being forced to litigate in federal court. Federal statutes and regulations, if read broadly for complete removal effect, will do more than just dilute state court jurisdiction and state sovereign interests. They will increase the financial and human costs for accident victims. The well-pleaded complaint

rule, properly understood, protects against that problem. The Eighth Circuit's decision vastly overreads a narrow exception to that rule, and should be rejected by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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Respectfully submitted.

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